IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1979
No. 79-1774

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

DONALD J. LOOK,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

The respondent is not dissatisfied with the petitioner's statement of jurisdiction and citation to opinion below.

Questions Presented.

1. Whether the Commonwealth's delay of more than four and one-half years in

bringing petitioner to trial deprived him of his right to a speedy trial pursuant to the Sixth and Fourteenth Amendments to the Constitution of the United States?

2. Whether a shotgun was properly admitted into evidence after the delay and resultant change in condition from the time of the shooting?

3. Whether the warrentless interception of petitioner's conversation with a police chief, without the knowledge or consent of either party was an unreasonable search and seizure, and violated 18 U.S.C. §§2510 et seq; and thereby required exclusion from evidence of the fruits, if any, of that surveillance?

Statutory and Constitutional Provisions Involved.

The relevant provisions are set out in the Petition, p.3 and in Appendix F, pp. 47a-48a.

Prior Proceedings.

On January 29, 1974, the defendant was arrested for the shooting of his wife, which had occurred in the town of Rochester the previous evening. On May 29, 1974, defendant was indicted by the Plymouth County grand jury for the crime of murder (R. 1-2).

On March 17, 1975, defendant's motion in limine, treated as a motion to suppress, was allowed (R. 2-8, 56). On March 26, 1975, the Commonwealth filed an application under G.L. c. 278, §28E, for leave to

appeal the allowance of defendant's motion in limine (R. 10). On November 2, 1977, the Commonwealth filed a motion to vacate the order of dismissal of the appeal and on November 22, 1977, that motion was denied (R. 10).

On March 27, 1978, the Commonwealth filed a request for a trial assignment (R. 10). On April 5, 1978, defendant filed a motion to dismiss alleging a speedy trial issue (R. 56). On June 15, 1978, defendant filed a motion to continue the case to the September, 1978, term. The motion was allowed (R. 56).

On September 22, 1978, after an evidentiary hearing, defendant's motion to dismiss was denied (R. 9-17).

On October 17, 1978, defendant's motions to suppress I,II and III were denied (R. 19, 27, 35, 57, 58). Defendant's application for review of the denial of said motions pursuant to G.L. c. 278, §28E, was denied by Justice Liacos.

On November 1, 1978, the defendant was convicted of second degree murder, and a motion for stay of execution pending appeal was filed and allowed. The Supreme Judicial Court affirmed the Conviction on March 11, 1980.

Statements of Facts.

On January 28, 1974, at approximately 11 p.m., Donald Look shot his wife, Susan, with a shotgun. Within an hour of the infliction of the wound, Susan Look died

(Tr. 3-15-16). Shortly after the shooting, emergency medical personnel arrived at the Look home (Tr. 3-15). First aid was administered to Susan Look at the residence and she was then transported to a hospital. During the treatment at the Look home, the emergency medical technicians learned from Susan Look that the shooting had followed an argument between Susan and the defendant (Tr. 3-25).

The defendant also went to the hospital where he waited in a room with Chief of Police Walter Pierce. He was orally advised by Chief Pierce of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and signed a sheet provided by Chief Pierce acknowledging his rights (Tr. 3-45).

Shortly after Mrs. Look's death, the defendant was allowed to view the body in the emergency room. At this time defendant became upset and did not wish to leave. At the request of Chief Pierce, defendant was forcibly removed from the room. A struggle resulted in an Officer Sweeney being hit twice by the defendant (Tr. 3-48).

Look was then taken to the Wareham police station and was placed in an interrogation room with Chief Pierce (Tr. 3-4849). While in the interrogation room, defendant made a number of statements to Chief Pierce which were not in response to questions by the chief. He related to Pierce his version of the incident, specifically that the shooting was accidental and occurred while he, Look, was

cleaning his shotgun (Tr. 380-81). Look also informed Pierce that an argument has preceded the shooting (Tr. 1-42-43).

While Chief Pierce and Look were in the interrogation room, and unknown to them, their conversation was, at least in part, overheard on an intercom system by a number of police officers (Tr. 1-87-88). Neither party were aware of or consented to the surveillance (Tr. 1-46). At about 2:30 A.M. on January 29, 1979, Lieutenants Masuret and Carr of the Massachusetts State Police arrived at the Wareham poIice station in the course of their investigation of the shooting of Susan Look. Upon their arrival at the station, Masuret and Carr were told by the police officers at the desk that Look had been

advised by Chief Pierce not to say anything to the State Police. They were also told something about Look having an argument with his wife on the day of the shooting. Prior to arriving at the police station, the State Police representatives had begun their investigation by visiting the Look residence (Tr. 3-157).

Lieutenants Masuret and Carr then conducted an interview with Donald Look. During the course of the interview, which lasted between one and a half and two hours, the State Police officers were alone with Look in the interrogation room. The interrogation began with Lieutenant Masuret informing Look of his rights under Miranda. Look acknowledged the rights and informed the State Police officers that he

had previously been advised of his rights by Chief Pierce and another police officer (Tr. 68, 113). About halfway through the interview, Lt. Masuret repeated the Miranda warnings to the defendant.

In response to questioning by the State Police officers, the defendant related his version of the incident. He stated that he arrived home, bringing some food, after going to the store. He stated that, during the evening, he had three or four beers and that his wife also had a couple. He said that they watched television and that at the beginning of a program called "Medical Center" he decided to leave the room and clean a shotgun which he wished to use for hunting. He related that while cleaning the gun it discharged

accidentally, wounding his wife (Tr. 3-160-164).

During the interview, Lt. Masuret asked Look if he had an argument with his wife and said he had had a minor argument (Tr. 3-110, 4-37).

At the conclusion of the interview, Look was booked on the charge of murder.

From January 29, 1974, to March 25, 1975, the disposition of this case proceeded in the usual course. A probable cause hearing was held, an indictment was returned, appearance of counsel was filed, a plea was entered, various discovery motions were filed and allowed by agreement and a hearing was held on defendant's motion to suppress various incriminating declarations made by the victim (R.

54-56). Following the allowance of the suppression motion, the Commonwealth petitioned for review under G.L. c. 278, §28E. This appeal was not prosecuted, which resulted in its dismissal on November 22, 1975. A motion to vacate the dismissal of the appeal was denied on November 22, 1977 (R. 10).

On March 27, 1978, the Commonwealth requested a trial assignment and on April 5, 1978, the defendant for the first time asserted a speedy trial demand in the form of a motion to dismiss the indictment (R. 10, 56). From March, 1978, to October, 1978, various defense motions were filed and denied and the case proceeded to trial from October 19, 1978, to November 1, 1978 (R. 56-58).

At trial the defense was essentially one of accident. The defendant testified, generally reiterating his earlier story that his shotgun discharged while he was cleaning it, wounding his wife. The defendant asserted that a good marital relationship existed between himself and the deceased. He acknowledged that shortly before the shooting he and his wife had had a disagreement concerning the adoption of a Vietnamese child, during which the defendant questioned the deceased concerning whether she had given birth to a child before their marriage. The defendant also presented testimony of a number of persons regarding their observations of a good marital relationship between the defendant and the deceased.

The Commonwealth introduced the testimony of one Paul Dockham establishing Susan Look's desire for a divorce and her dissatisfication with the property arrangements between herself and her husband.

Vivian Ivers, the deceased's stepmother, testified concerning a phone call she received from the deceased immediately before the shooting. Ivers indicated that Susan Look was upset concerning her husband's accusation that she had given birth prior to her marriage to the defendant and evidenced an intention to leave her husband (Tr. 6-16).

At the close of the testimony, the jury returned a verdict of second degree murder (R. 58).

Argument.

I. The Petitioner Was Not Denied His Right to a Speedy Trial.

A. The Failure of the Supreme Judicial Court to Court the Period Between Arrest and Indictment is not Ground for Summary Reversal.

Whether the Court below measured the length of delay from the time of arrest (Dillingham v. United States, 423 U.S. 64 (1975), or the time of indictment (United States v. Marion, 404 U.S. 307 (1971) is not controlling, for the court found that the length of delay was sufficient to "trigger" further inquiry into whether petitioner was denied his constitutional right to a speedy trial. While Dillingham[1/] does require that post-arrest

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[1/] A review of Petitioners Brief in the Court below indicates that no reference was made to Dillingham.

pre-indictment delay be considered petitioner was in no manner prejudiced in the instant case. The Supreme Judicial Court found that the delay triggered the test of Barker v. Wingo, 407 U.S. 514 and "it should be weighed quite heavily against the Commonwealth" (footnote omitted) Commonwealth v. Look, (App. C., 29a.) Given that no absolute time period beyond which a delay may not occur exists, the precise length of the delay here could not accure to the petitioner's benefit any more than it did.

B. The Decision of the Court Below is Consistent with the Balancing Approach Enunciated in Barker v. Wingo, 407 U.S. 514 (1972).

The petitioner apparently argues only that the court abused it discretion and

misapplied Barker v. Wingo in imposing upon petitioner the burden of proving prejudice. However, the petitioner does not argue that there exists or should exist a rule shifting the burden of proof or to alter the balancing approach of Barker v. Wingo (Petition, 14). It is difficult to discern what, if any question then, petitioner attempts to raise which is of sufficient substantiality and broad import to justify this courts consideration.

1. The Supreme Judicial Court Applied the Correct Test.

There was neither a mechanical imposition of a "high" burden of proof on petitioner to demonstrate prejudice, nor did the court require that the petitioner make an affirmative demonstration of prejudice as a necessary and sufficient

condition for demonstrating denial of the right of speedy trial. Contrast, Moore v. Arizona, 414 U.S. 25, 26 (1973). Review of the decision below reflects the court's awareness that flexibility and balancing of the factors identified in Barker v. Wingo is the appropriate approach. The court approached the issue stating "The analysis of this claim necessitates a balancing of four factors..." In considering first, the length of delay, the court not only found it to be "unquestionably sufficient to 'trigger further inquiry," but was "...clearly to be weighed against the Commonwealth, absent an adequate explanation for that delay." (App. C., p. 27a.). Finding that the delay resulted solely from negligence on the part of the

Commonwealth, the court reasoned that the delay, even in the absence of any calculated attempt to frustrate the defense, to be a factor to be "weighed quite heavily against the Commonwealth" (footnote omitted) App. C., 29a. The court then noted that the petitioner waited nearly four years before asserting his right to a prompt trial, and, then, only did so five months after the Commonwealth filed a motion to vacate the dismissal of its interlocutory appeal, and determined that "[t]his inaction on his part must be weighed heavily against him" (App. C, p. 30a).

As to the question of prejudice, the petitioner's allegations are speculative and insubstantial. The expected testimony

of the unavailable witness while relevant to his marital relationship would have been merely cumulative of several witnesses who did testify. The court also considered the failure of memory of witnesses and possible 'anxiety and concern" and found no support for either claim. Finally, petitioner's claim of prejudice as the admission of the shotgun was considered in the context then presented,[2/] in without merit. This

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2/The stated ground for objection to the introduction of the shotgun was:

> "MR. LOUISON: My ground, your Honor, as to the condition of the gun, whether it has been cleaned or changed in any way from the time he found it. I think the temptation is to assume that -- let me say this, if it doesn't go into the jury room I would have no objection, but if it's going to be given into the hands of the jury, then I say the question of how it was at

evidentiary matter was appropriate for cross-examination and, as was found, goes to "the weight of the evidence rather than its admissibility" (App. C, 41a).

The court then, balancing all four factors, held that the lengthy delay and lack of reasons therefore balanced against the failure of the defendant to assert his right in addition to his failure to demonstrate prejudice, "tip the scales against him" (App. C, 33a). The court

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Footnote Continued

> the time and how it is now and what has been done with it in the interim becomes relevant before it becomes an actualy exhibit to go into the hands of the jurors.
>
> THE COURT: Objection overruled. It may be marked as an exhibit.
>
> MR. LOUISON: Exception." (Tr. 4-94).

clearly maintained the flexibility of approach required by Barker.

2. The Decision Below is not in Significant Conflict with Decisions of the Federal Courts of Appeals.

The general rule in the federal courts is to require some showing of prejudice by the defendant despite excessive delays. United States v. Saglimbene, 471 F.2d 16, 17 (2nd Cir. 1972) (six years); United States v. Dreyer, 533 F.2d 112, 116 (3rd Cir. 1976); Morrison v. Jones, 565 F.2d 727, 723-724 (4th Cir. 1977); United States v. Enright, 579 F.2d 980, 990 (6th Cir. 1978); United States ex rel. Little v. Twomey, 477 F.2d 767 (7th Cir. 1973). In the First Circuit the rule is that prejudice may not be presumed from the mere

passage of time. United States v. DeLeo, 422 F.2d 487, 494 (1st Cir. 1970).

The burden to show lack of prejudice shifts to the government only when the government's delay is not only lengthy but is purposeful in the sense of a deliberate delay to gain tactical advantage. Murray v. Wainwright, 450 F.2d 465 (5th Cir. 1971), or, prejudice becomes irrelevant where a combination of unexcused delay in face of demands for a trial weighs heavily in favor of the accused. Hoskins v. Wainwright, 485 F.2d 1186 (5th Cir. 1973). See Prince v. Alabama, 507 F.2d 693 (5th Cir. 1975). In the instant case there was no purposeful delay nor did petitioner assert his rights. There is no conflict.

The Commonwealth respectfully suggests that petitioner fails to bring before this court any substantial federal question; he demonstrates no deviation from any constitutionally compelled consideration in the assessment by the lower court of his speedy trial claim; he asks only that this court substitute its own assessement of the factors appropriately considered by the Supreme Judicial Court.

II. Electronic Surveillance.

The court below found no violation of either state or federal law by reason of certain police officiers, who did not testify, overhearing by means of an office intercom the petitioner's conversation with the Chief of Police. First, there can be no dispute that the Chief, as a participant

in the conversation, could testify. The petitioner had been advised of his Miranda rights. Second, Officers Carr and Masuret came upon knowledge of the argument through an independent source. The report of Lt. Masuret reveals that Look was questioned on the basis of the statements of the victim to the Emergency Medical Technician

> "Bnner [sic] stated that he talked with the victim and she called him by name. She then said, 'Donald shot me.' Donald stated that it was an accident, however she retorted, 'We had an arguement - He did it on purpose.' She repeated this several times to Bnner. This statement was made in the presence of Look. Look was questioned at the police station as to why she would say something like this and he stated that he couldn't imagine why she would say

> such a thing and kept insisting that it was an accident. (Ex. 21, Tr. 5-131).

Thus it cannot be said that the structure of th interrogation of Look was formed by an exploitation of an illegality.

Finally, there was no initial illegality. The Commonwealth submits that the reasoning of the Supreme Judicial Court is correct.

> "...the Federal statute requires that a speaker have a justifiable expectation of privacy with regard to "oral communications." 18 U.S.C. §2510(2) (1976). In determining what is a justified expectation of privacy for purposes of §2510, we must look to traditional Fourth Amendment law. See United States v. Duncan, 598 F.2d 839, 847 (4th Cir.), cert. denied, U.S. (1979); United States v. Pui Kan Lam, 483 F.2d 1202,

> 1205-1206 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974); People v. Santos, 26 Cal. App. 3d 397, 402 (1972). As stated above, a person who is talking to a police officer after being told that anything he says may be used against him in court, cannot justifiably claim to have an expectation of privacy as to any statements he makes. Duncan, supra at 852. Santos, supra. Therefore we think Look's statements do not fall within the definition of "oral communications" of §2510, and are not subject to the Federal statute." (App. C, 40a).

Conclusion.

For the reasons stated above, the Commonwealth submits that the petition does not present a substantial constitutional question justifying the grant of a writ of certiorari. The petition should be denied.

Respectfully submitted,
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